they did nothing prejudicial to the interests of Japan, but Japanese subjects were expelled from the Far Eastern Provinces of Russia.[13] It may be said that while the modern practice is against the expulsion of enemy subjects in time of war, in the absence of conventional stipulation the exercise of the right upon considerations of political or military necessity is not questioned.

The state of international law relating to the expulsion of aliens may be summarized as follows:

1. A state has the power to expel foreigners whose presence is deemed inimical to the public interest.

2. Expulsion is an extraordinary police measure, to be resorted to only in extreme cases, and should be accomplished with as little hardship to the person expelled as the circumstances will admit.

3. If expulsion takes place without sufficient cause, or if the manner of expulsion is in violation of the requirements of international law, the government of which the person expelled is a citizen or subject may demand satisfaction.

The CHAIRMAN. This subject has been so ably and exhaustively treated, that it does not at first, perhaps, suggest further discussion. If there be a desire to speak upon it, you will now present it. Otherwise we will proceed to the next subject on the program, the Status of Resident Aliens, under the sub-head, "The Right of the Alien to Participate in the Social and Economic Life of the Community," and we will have the pleasure of listening to a paper by Professor Edward Elliott, of Princeton University.

ADDRESS OF PROFESSOR EDWARD ELLIOTT, OF PRINCETON UNIVERSITY, ON

The Right of Resident Aliens to Participate in the Social and Economic Life of the Community.

The status of the resident alien is primarily the result of the modern world order. As the family of nations has replaced the earlier conception of isolation and exclusion, the status of the alien

[13] Takahashi, Int. Law Applied to the Russo-Japanese War, p. 31.

has passed from that of enemy, through that of stranger admitted on sufferance, to that of equal protection of life and property, and in some states to a legal status very nearly equal to that of citizen.

The stranger in antiquity was a *hostis,* an enemy, by the mere fact of being a stranger, and at a later time under ancient systems of law which were personal, as at Rome, the stranger, though not regarded as an enemy, was nevertheless incapable of having rights, because the system of law did not apply to him. It is well known that out of these circumstances grew the *jus gentium* of Rome. At a still later period, the alien, if permitted to participate in the economic life of the community, usually had no rights, but was admitted on sufferance, which could be withdrawn at the pleasure of the sovereign. Exemption from molestation was oftener than not purchased at a high price. Eventually aliens were permitted to engage in trade of certain sorts by license. Yet certain fields of economic effort were closed against all aliens, and certain aliens, as the Jews, occupied a less favored position than the others. Permission to trade by license was, moreover, very narrowly limited and the participation by aliens in the economic life was jealously guarded against on the theory that the benefits of commerce should be reserved for citizens. The advantages of international trade and the benefits to be derived from foreign labor and capital were long unappreciated, and it was generally only when advantage to the state was in prospect through the introduction of elements lacking in its own population that aliens were welcomed and given a legal status. Toleration, or even license of trade, gave but a restricted opportunity of participation in the economic life of the community. Ownership of real property, rights of succession and inheritance remained long prohibited. The *droit d'aubaine* continued in existence till under the development of more humane principles it was replaced by the *droit de de'traction.* The alien dying in a foreign country and forfeiting all his property to the sovereign was succeeded by the alien who payed a heavy tax for the privilege of withdrawal, and he in turn was succeeded by the resident alien closely assimilated in legal status to the citizen.

The change in the attitude toward aliens is due to the development

of an international society composed of states which have reciprocally recognized each other's equality; a society whose members are interdependent, not self-sufficient. The modern state can not live independently of other states; it can not shut itself off and live a life sufficient unto itself. The hermit kingdoms have been forced by the pressure of modern civilization to throw open their doors and it is generally agreed that no state to-day can cut itself off from others by the total exclusion of foreigners. The nature of the modern international community demands as its logical consequence a reciprocal treatment of aliens which will reflect the primary principles of state existence. Perhaps the logical consequence of the principle of equality of states would be a complete equality of status between citizens and aliens, certainly in all civil, if not political, rights. But international law has not been so unique as to reach an entirely logical development. There are still some notable exceptions both as to particular rights and particular persons. Crude experience has played its part and the remnants of the time when the stranger was an enemy still remain.

Every state needs intercourse with other states in order to supply its citizens with the material and spiritual goods necessary for their best development. This intercourse in turn necessitates a residence abroad of many citizens, and literally millions of citizens, for a variety of reasons, among which business and pleasure are chief, are domiciled in foreign countries. For our own part, the United States has been and is the goal of multitudes of aliens seeking new homes. The migrating throngs of to-day are not defenceless or without rights and duties; on the contrary certain well-defined principles are recognized by international law in their treatment. The right of a state to afford protection to its nationals abroad and the duty of a state to afford protection to the aliens within its boundaries are commonplaces. Membership in the modern state implies the correlative terms allegiance and protection.

Though no state may exclude all foreigners, it is usually agreed that states may set the conditions under which they will receive aliens who are seeking entrance either temporarily or for purposes of residence. The restriction upon immigration may be by classes

and even by races. Criminals, paupers, those suffering from contagious diseases, in short, all who may prove a burden or a menace may well be excluded. Other classes may be restricted, as the entrance of Jews into Russia and of Chinese into the United States. The latter, however, are in an exceptional position because China has not been fully recognized as an equal member of the family of nations. The foundation of the right of exclusion is the primary right of self-protection. The sensitiveness of states to any discrimination against their citizens which would imply that the states were not recognized as equals has been clearly indicated in the attitude of Japan toward the treatment of the school question in California, and it may be safely said that such discriminations would undoubtedly be met by measures of retaliation if not of war.

When the alien has been permitted to enter a state, obligations arise both on his side and on that of the state receiving him. The protection of his person and property is entailed to the same degree as for citizens. Limitations may be and are placed upon the kinds of property which aliens may hold, but so far as they are allowed to hold property, they must be protected. If a state fails to furnish aliens with the same amount of protection it affords its own citizens, it becomes liable to the alien's native state for damages and reparation. The alien's claim under normal circumstances must be presented in the courts, unless the injury received is clearly due to a failure on the part of the state to take proper measures to afford the necessary protection, or the case is one of a denial of justice. Finally, states have the undoubted right to expel aliens as a measure of self-protection, and neither the alien nor his government has the right to protest unless the expulsion be arbitrary or involves discrimination.

The alien, likewise, has obligations to the foreign state, whether he be domiciled or not. It has been said that aliens owe a temporary allegiance to the foreign state; at least they owe obedience to its laws and are as completely subject to the laws as are citizens. It is an essential notion in the concept of the modern state that all persons within its territory are subject to its jurisdiction. Certain exceptions are, however, well recognized. In the United States it has

been held that aliens may commit treason and are subject to the neutrality statutes. Other obligations resting upon aliens are the support of the social order against mob violence. The United States in the Civil War claimed the right to draft domiciled aliens into its armies, and Great Britain did not seek to protect such of her citizens as had declared their intention of becoming citizens of the United States and only asked that time be granted them in which to leave the country. Aliens, moreover, are liable to all ordinary taxes to which citizens are liable.

The rights of aliens are not determined solely by national laws. International law, as we have seen, has developed principles which set limits to the treatment accorded by the legislation of the individual states. There is another source of rights, namely treaties, which in recent times has played a most important part in granting rights to aliens.

From the discussion which has preceded, it is to be inferred that aliens when admitted to residence, would be granted participation in the social and economic life of the community, but we find that in treaties of amity and commerce provision is often made for full rights of residence, travel, and religion, in so far as they are granted to the subjects of the most favored nation. Rights of residence and travel carry with them unquestionably the right of participation in the social life of the community. The final arrangement of the Japanese school question can scarcely be regarded as having demonstrated the inclusion of the right of education.

The most important restrictions upon aliens are those relating to the right to participate in the economic life of the community. If an alien is admitted to residence, protection of his person follows as an inevitable duty of the state — a protection that is as full and free as that accorded to citizens. But it does not follow with a like certainty that admission to residence carries with it complete economic freedom. Logically there is no reason why any economic right should follow the right of residence except that entire absence of such rights would render the right of residence in the main illusory. Certainly it would be out of harmony with the thought and need of the day and contrary to the course of development. A large part of

the hostility to aliens was formerly due to the economic conceptions held. Trade was not regarded as mutually advantageous and its benefits were desired for citizens. Whatever profit there might be in business should properly go to the inhabitants of the state in question. The exclusive colonial policy pursued down to the nineteenth century was a natural consequence of this economic notion. With clearer conceptions of the nature of trade and the development of international commerce, hostility to aliens in large measure disappeared and national legislation began to grant them rights to participate in the economic life of the community.

Almost from the beginning there has been a recognized difference in the treatment of personal and real property. The right of the alien to hold, acquire and dispose of personalty of every sort is universally recognized. The attitude toward personal property was doubtless due in part to its nature and in part to the difficulty of preventing the resident alien from holding it or disposing of it. There has always been a generally recognized restriction upon the right of aliens to hold real estate. The English common law doctrine which forbade acquisition of title by act of law was received by the United States but has been generally modified.

The history of our national legislation regarding ownership of the public lands is instructive. Under the impulse of the idea that our country was an asylum for the oppressed of the earth, we threw open the public domain to citizen and alien alike for purchase. Preemption and homestead rights were made available only to those declaring their intention to become citizens, with the restriction that complete title could not be acquired until after the acquisition of citizenship. As a matter of fact most of the settlers did become citizens. Somewhat later when the West was fairly well settled and the most desirable lands were gone, a reaction set in against alien ownership. The fact that great tracts had been bought up by foreign owners for purposes of speculation was adduced as a reason for abandoning the previous policy. So strong did the sentiment against alien ownership of real estate become, that in 1887 Congress passed so stringent a law against it in the District of Columbia and in the Territories that foreign states were prevented from owning the

grounds for their legations in Washington and an amendment to permit them to do so was passed in the following year. Here was an entire return to the old policy of exclusion, but it was contrary to the tendency of the age when other states were removing restrictions upon the holding of real estate, and after ten years Congress repealed, practically, the common law doctrine of the Act of 1887 in the Territories, and in 1905 the same freedom of alien ownership was made possible in the District of Columbia. The laws of 1887 and 1897 illustrated the fact that treaties are an important factor in determining the status of aliens, for both of them contain a provision to the effect that nothing in the Act should impair the obligation of treaty rights.

In still another field there are restrictions often laid upon the capacity of aliens, that of shipping and navigation. National legislation is still tenacious of the exclusive right of citizens to fly the flag and engage in the coasting trade. The right to be an officer on board is also frequently restricted to citizens. There would seem to be an incongruity in the national flag flying above a vessel owned and officered by foreigners, since the flag carries with it the duty of protection by the state, and it is only citizens and their property that are entitled to protection abroad. The alien must look to his own state and therefore the registry of vessels is limited to citizens.

The trades and professions may likewise be closed to aliens. The basis of such a closure is the reservation of the benefits of such trades and professions to citizens or the desire to have only citizens in them because of their importance to the national welfare.

The right of resident aliens to participate in the economic life of the community may be limited, also, in the matter of ownership of shares in corporations. States can forbid aliens to hold stock in its corporations or admit them on its own terms. Patents, trade-marks and copyrights are essentially national affairs, limited to citizens, but they are made available to aliens both by national legislation and by treaties and international conventions.

From what has been said it will be clear that the position of the alien is by no means entirely assimilated to that of the citizen in social and economic relations, great as has been the advance in that

direction. There are two factors, national welfare and international interest, constantly at work and frequently in opposition which will retard for a long time, if not indefinitely, the placing of the alien in a status of equality with the citizen. So long as the national welfare is regarded as demanding a differentiation, so long will it exist. Though the resident alien may be discriminated against in the kind and character of his economic activities, he is entitled, to the extent to which he is permitted rights, to all the protection in these respects that a citizen would enjoy. That is to say, the courts of law and equity must be open to him and judgment must be given irrespective of the fact of alienage. If the courts are not open to the alien or if there is a denial or miscarriage of justice for which no legal recourse exists, or even if the laws are in themselves oppressive, then the alien may appeal to his own government for protection and reparation.

The CHAIRMAN. The discussion of the social and economic aspects of the situation of aliens, which has been established upon such a high plane by Professor Elliott, will be continued by Professor Jesse S. Reeves, of the University of Michigan.

ADDRESS OF PROFESSOR JESSE S. REEVES, OF THE UNIVERSITY OF MICHIGAN,

ON

The Right of the Alien to Participate in the Social and Economic Life of the Community.

The topic which has been assigned me bears so intimate a relation to those which have preceded it, and especially to the papers dealing with the admission of aliens and the measure of protection due them after admission, that any results reached independently may seem somewhat inconclusive and unsatisfactory. The discussion of the right of an alien in the community is indissolubly connected with the duty owed by the state receiving him, for the reason that the duty is correlative with the right. Again, the right of the alien and the duty of the receiving state toward him are modified to

some extent by the conditions of his admission. Moreover the rights of aliens vary according to the position of the alien as a transient, or as resident, or as domiciled. The first and second have become practically identical. The position of the resident as contrasted with that of the domiciled alien, with the development of divergent theories as to the effect of domicile, cannot be considered, as the subject is limited to a discussion of the rights of the resident alien.

The status of the private individual in international law is one of slow and late growth. Its development has proceeded *pari passu* with the concession to him of rights at law within the state. The position of the alien, resident or domiciled, was once wholly a matter of municipal law. The extensions made in his favor beyond this began through treaty stipulations. There is a *tertium quid* of rights in international law which begin to be noticed only when states regard not only the aliens within their own territory, but their nationals resident within the confines of other states. Some vague standard of duty on the part of a state towards strangers was outlined by the older writers upon the law of nations. The right of a state to look after its nationals domiciled elsewhere seems to have been developed by treaty and not until the nineteenth century do we find an adequate expression of the measure of duty which a state owes its nationals resident abroad, or of a standard of rights which an individual might have against the country of his residence — rights in international law which the state of his origin might enforce.

Grotius depicts an international society of states which seems to us quite rudimentary and insufficient. States, being independent and equal in law, regarded only units like themselves and paid little attention to individuals. The law of nature provided a counsel of perfection. A state ought to permit strangers to enter its territory for innocent passage, and to remain there in times of peace, for the purpose of recruiting health, or for "some other legitimate reason." Such was an "innocent use" which a state ought not to deny. A state furthermore ought not to forbid transient strangers to make habitations for themselves or to settle upon unoccupied lands which without occupants would be worthless. Furthermore everyone should have the right to buy, if not to sell, his own merchandise.

Certain actions should be permitted to all strangers indifferently, and to exclude particular individuals from them was to injure them. "If strangers are permitted, for instance, to hunt or to fish or to take pearls, or to inherit by a will or to contract marriage * * * these rights ought not to be denied any individuals not tainted with crime."[1] Such actions, Grotius adds, are to be permitted because of "Natural Liberty," and are not to be taken away by law. Obviously, Grotius's principles for the treatment of the alien according to the law common to all men, although embroidered with many references to the Fathers and to classical authors, as was his habit, did not tally with the practice of his day. Pufendorf takes exception to the contention of his predecessor that there are rights which are to be conceded to all promiscuously. Concessions are made, he says, either expressly or tacitly.

When we grant a thing expressly to another, we do it either *Precariously,* or in the matter of a *Pact* or *perfect Promise.* Now that anyone should give a *perfect Right* over a thing of his (not due by the Law of Nature) to all Nations known or unknown, without Limit or Restraint, is a case which I believe never did, and never will happen. * * * But when a man either by *Pact* or *free* Favour has granted such a particular Privilege to all that come under his Friendship or Acquaintance, for a mere Stranger to pretend a Right to the same Indulgence, would be very Imprudent and very Wicked. As for those things which we permit *Tacitly,* or as it were overlook, they are reckon'd of Course to be of the same nature with Precarious Favours; and such may be fairly revok'd, either upon the Change of our Affairs and Circumstances, or because the Persons who enjoy'd them did not make so prudent and modest a use of them as they ought.[2]

Pufendorf's point of view is that of the state and not of the individual. The close approach which Grotius made to a doctrine of natural rights as a part of the endowment of the individual Pufendorf disregarded. The position of the stranger was only one of tolerance. What position he had was one not of right but of grace

[1] Book II, Chapter 2, 14–24.

[2] Of the Law of Nature and Nations (Kennet's Translation, 1717), Book III, Chap. III, 14.

and favor. The tacit concession which might be revoked produced no legal status whatever. On the other hand the pact or express promise gave him a *locus standi.* These pacts had historically been of various kinds: capitulations, concessions, charters, and treaties.

The practice of nations, in aiming to preserve their independence and territorial sovereignty, comported with Pufendorf's argument. The rights of the alien were to be found either in the municipal law of the state, as concessions which might by the same power be revoked, or in the positive stipulations of international agreements. The doctrine agreed with the favorite state policy of the seventeenth and eighteenth centuries, one of social and economic exclusiveness. Many states, especially the Netherlands, Denmark, and Sweden, had negotiated commercial treaties containing extremely liberal provisions as to the subjects of each resident in the territory of the other. These were, however, the exception and not the rule and ran counter to the generally accepted theories of national policy and economy. The older international law harmonized fully with these theories. It was based upon the so-called "primary" or "absolute" rights of states, of independence, equality, and jurisdiction, or sovereignty. Using these ideas as the foundations of legal dogmas, nothing but a very rudimentary international society is possible. The points of contact between state and state in the old sense were relatively infrequent. The conception of the state as an independent unit is, when pressed to its logical extreme, a synonym for exclusiveness. It negates the existence of an international society, *ubi jus est.* Austin found this to be so, for while maintaining with logical but spirit-killing consistency the notion of self-contained sovereignty, he admitted that in practice states do defer to other states similarly existent and constituted. "Every government," he said, "let it be never so powerful, renders occasional obedience to the commands of other governments." [3] This statement is legally and philosophically untrue; it is an unsuccessful attempt to make his theory of law square with actual international life. It is obvious that every state habitually and at all times acts or forbears in accordance with the habitual forbearances and acts of other states. By the mutual recog-

[3] Lectures on Jurisprudence, 3d Ed. I, 242.

nition of such acts and forbearances each state in international society is enabled in a way to "discount the future." In them are found the legal relationships of international society, and out of them international law finds expression.

The old points of contact between state and state were considered in the light of the fundamental dogmas of international law. International questions were those which arose when states, as independent units, came into conflict. They were those principally of territory, of precedence, and of diplomatic and official intercourse. In the relations of peace, they were illustrated by fairly simple and precise rules. The old legal doctrines of independence and equality fitted the old facts of commercial exclusiveness and of fixity of population. Racial, social, civic, and commercial isolation were voiced in the myriad divergencies in municipal systems, and held back the development of international law. The international society of our day is fundamentally different from that of the seventeenth and eighteenth centuries. It rests as well upon interdependence as upon independence. Not isolation but intercommunication is the great fact in the modern life of states. The points of contact are not occasional but constant. States are in action not only in war but in peace. The increased bulk of the law of peace is largely the result, not of the increased points of contact with state and state in the old sense, but of the newer *rapports* brought about indirectly through the contact of individuals. The census of nineteen hundred showed that there were then in the United States over a million aliens. Each one of these represented a potential point of contact between this country and the state of his allegiance. In reference to each of these individuals the United States owed a duty. The duty was not to the individual alien *qua* individual, but to the state which claimed the alien as a national. While the number of aliens in the United States has enormously increased during the past decade, many thousands of American citizens have become scattered over the world, resident as aliens in foreign countries, there engaged in trade and commerce with an invested capital of many millions, perhaps of billions. On behalf of each of these, as a result of the fact of American citizenship, the United States has rights as against the states

in which American citizens have been permitted to live and to engage in social, economic, and industrial activity. In these respects the United States differs only in degree from other states.

The measure of the rights and duties of states is to be found either in the positive stipulations of treaties or in that norm which is the rule of international law. Furthermore, this measure has tended in the long run to be stated in terms of municipal law. National and international public opinion tends to coincide in legal standards.

As the status of the alien was once wholly a matter of municipal law, whatever position he had grew out of concession and special privilege. The resident alien, usually engaged in commerce, was a source of profit to the state as personified in its sovereign Like the early merchants at Canton, he was admitted because he furnished a valuable opportunity for "squeeze." The alien was tolerated only in so far as it was profitable to tolerate him. Now and then old commercial treaties gave reciprocal privileges to the nationals of the contracting Powers. In the draft of the commercial treaty prepared in 1776 by the committee of the Continental Congress provision was made for reciprocal equality of treatment. All that a state was then usually willing to grant by treaty was that aliens should have the rights and privileges of the subjects of the most favored nations. This idea is found in the earlier commercial treaties which the United States negotiated beginning with the French treaty of 1778. In the treaty with Prussia of 1785 the United States realized its desire as expressed in 1776. While the nationals of the contracting parties were to be subject to no greater burdens of trade and commerce than were imposed upon those of the most favored nations, the right was recognized that the nationals of each party might frequent the coasts and countries of the other in order to reside and trade there. This clause was inserted in several treaties which the United States negotiated prior to 1825. In that year Henry Clay as Secretary of State instructed Poinsett, in anticipation of a commercial treaty with Mexico, to stipulate for complete equal privileges as to residence, trade, and commerce.

The rule of the most favored nation may not be, and scarcely ever is, equal in its operation between two contracting parties. It could

only be equal if the measure of voluntary concession by each of them to the most favored third power were precisely the same; but as that rarely happens, by referring the citizens of the two contracting powers to such a rule, the fair competition between them, which ought always to be a primary object, is not secured, but on the contrary those who belong to the nation which has shown least liberality to other nations are enabled to engross almost the entire commerce and navigation carried on between the two contracting powers.[4]

Poinsett failed in his endeavor to incorporate this idea. In the Treaty of 1825, however, which Clay signed with the representative of Central America, it found complete expression. Not only, as in the Prussian model of 1785, were the citizens of each country allowed to "frequent all the coasts and countries of the other and reside and trade there," but they were to enjoy "all the rights, privileges, and exemptions in navigation and commerce which *native citizens* do or shall enjoy, submitting themselves to the laws, decrees, and usages there established to which *native citizens* are subjected," the coasting trade excepted. Substantially the same provision appears in the treaties with Denmark (1826), Sweden (1827), Prussia (1828), Austria-Hungary (1829), Russia (1832), Greece (1837), Portugal (1840), Switzerland (1850), Argentine (1853), and in others since that time, with the important limitation that such freedom of navigation and trade should exist only where foreign commerce is permitted. It is true that treaty stipulations placing aliens upon the same footing as nationals in reference to residence and trade do not make rules of international law upon these points. The treaties however are evidence as to the changed attitude toward aliens which took place during the second quarter of the nineteenth century, when the ideas of economic freedom assisted in the extension of a system of commercial liberty to those parts of the New World which had so long been dominated by the antiquated spirit of isolation. The commercial policy of the United States toward the new Spanish American nations, in offering complete and reciprocal freedom of residence and commerce, was inspired by a desire to win over that commerce which Great Britain had drawn to herself at the breakdown

[4] Am. State Papers, For. Rel. VI, 578.

of the Spanish colonial system. This policy was but one phase of the change in international life. It was remarked by Savigny that

a rigid separation between different states formerly prevailed in place of which an ever-increasing approximation has been taking place. Corresponding to this a remarkable diminution of previous differences of opinion has manifested itself among the writers of various nations. Two facts * * * testify to this tendency, the more gradual recognition of equal legal capacity of natives and foreigners, and the increasing agreement as to many propositions of a universal customary law.[5]

The old restrictions placed upon the rights of aliens to hold land, which the common law inherited from the customs of feudal land-holding, and the exactions which continental European sovereigns laid upon aliens, such as the *droit d'aubaine,* have largely or quite disappeared. Complete identity of status of national and alien under the municipal law in matters of private right is, however, only indirectly the concern of international law. Certain inequalities of status persist, principally in matters of navigation and shipping. They do not interfere with the doctrine of international law which proceeded to set a standard of equality, not of rights, but of treatment; not of status, but of protection.

The greatest factor in the change was the acceptance of the doctrines of natural rights. In modern thought the natural and primordial rights of individuals have been relegated to the historical museum along with the accompanying theory of the social compact. The important point to be noticed is that these rights became expressed in terms of law both in America and in Europe. They have furnished a large common factor in the constitutional law of most states since the American and French revolutions. Even if, as Heffter remarks, "one dénies the obligatory and universal force of these pretended primordial rights one must admit nevertheless that they are a norm for those states which have adopted the laws of natural morality as a rule of conduct." The inclusion of these rights into the constitutional laws of states proceeded simultaneously with the acceptance of the liberal theories of trade and commerce which

[5] Private International Law, Guthrie's translation, 92.

the economists of the eighteenth century advocated, and both spread over the world with the newer commercial and trade movements of the nineteenth century. To quote Heffter again:

The needs common to all persons are comprised in the idea of personal liberty. Man being called upon to develop himself physically and morally in every way in which human nature is capable, the state, which is itself only a portion of humanity, instead of troubling or interfering with this free development ought, on the contrary, to assist it by every means. On account of its high mission the state ought besides to lend its assistance to its members, who either temporarily or permanently are hindered in the enjoyment of common liberty.[6]

From the basis of individual liberty Heffter developed three elementary rights of the resident alien: (1) the right of a free choice of residence in any state in which the individual believed himself able to live most freely and comfortably, within which are included the rights of immigration and (subject to certain exceptions) of admission within another state; and (2) the right to the preservation, defense, and development of his physical personality within the limits of necessity and without injury on the part of others. From this he derived the right to hold property, of commerce and exchange, and of marriage. Finally he added (3), the right of the existence and free development of his moral personality, including that of intellectual and religious freedom. This analysis of the rights of an alien resident within a state, based as it is upon the doctrine of natural rights, can not be accepted as satisfactory. It is but little less vague than the hortatory exposition of Grotius.

A very recent writer, Professor Nys, also rests the rights of a resident alien upon the doctrine of individual liberty. As civil liberty denotes the equal capacity for legal rights and duties, individual liberty has to do with the moral and material interest of the individual. An examination of the latter idea as developed by Nys reveals something much like the doctrine of natural rights. It means the right to the security of person and property, of guarantees against arbitrary arrest, imprisonment, and penalties; of the inviolability of the private domicile and of freedom of commerce, work, and industry.

[6] Le Droit International de l'Europe, par. 58.

It includes freedom of conscience and of religion, of assembly and of the press, freedom of association and of learning. Are these rights, which are so frequently but by no means universally recognized in the municipal laws of states, carried by individuals into other states? "Can a state refuse them to the nationals of another state without violating international law? Can the alien invoke them in any state just as the national may?" Nys asks. He answers:

Great principles enter upon the scene. The law [*droit*] of the state and the law [*droit*] of the international community stand face to face. But in the degree of civilization to which the modern world has come, the positive law is bound to solve and determine more than one question which formerly gave rise to interminable dissertations. It is proper to inquire if it is exact to say, as did more than one illustrious jurist, that the essential difference between the legal positions of nationals and aliens is that the latter are tolerated in the state and the former have the right to live in it. Undoubtedly the law of a state prevails, but the fact that there is a conflict between that law and the right of the alien is, in truth, the averment of the existence of the right of the alien, and while, in the conflict between two rights, the superior right prevails and does not annihilate the inferior law, it tends to suspend its exercise.[7]

Here, it would seem, is the crux of the problem. Which is really the superior and which is the inferior law? If the municipal law be supreme, through the exercise of the territorial sovereignty of the state, it is exclusive, and the position of the alien is after all one of tolerance only. On the other hand, if the right of the alien as determined by international law be supreme, there may be within each state an *imperium in imperio,* which, to use the words of Mr. Baty,

would disestablish states as we know them. Whenever a community desired to live in a fashion which did not commend itself to its neighbors, it would be confronted by the necessity of leaving outside the scope of its activity this solid mass of undigested and indigestible foreigners. It can not bring them into line with its own subjects; it can not ask them to go. They remain, a privileged excrescence, a splinter in the body politic, a standing defiance to a law, a perpetual challenge to the nation.[8]

[7] Le Droit International, II, 216.

[8] International Law, 25.

This is a *reductio ad absurdum.* The jurisdiction of the state is not denied by the assertion of a sphere of legal right inherent in the resident alien. The error in Mr. Baty's contention, aside from an overstrained adherence to the traditional dogmas of territorial sovereignty, is that it looks at but one side of the problem. A state as a member of international society owes a duty to its resident aliens because these aliens are nationals of other states, like it members of international society. The right which the country of origin has as against the country of residence, by which it may require a standard of protection as set forth by international law, is conditioned upon a fundamental principle. When the national of one state is received as a resident by another state, the individual is bound, as a matter of international law, to observe the municipal laws of the receiving state.

The rights of the alien resident are not natural rights in the old sense of the word. Natural rights were individual rights and were based upon a philosophy of individualism. They may stand opposed to the so-called natural or primordial rights of states. The rights which the resident alien has are social rights and he owes social duties to the state. Both are expressed in terms of municipal law. He can not remain in a state and receive its protection and yet be an anti-social force. His duty is to conform to the laws of the state of his residence. Only as he does so does he acquire rights in the enjoyment of which the resident state owes a duty to protect him. Only as he does so, with certain well-defined exceptions, does the country of his origin have a right to see that he receives this protection. On the one hand the receiving state is bound, as an international duty, to extend to him a régime of law. On the other hand, the alien is held to accord himself with the régime of law there existing. To put it differently, if the alien is burdened with the legal duty of obeying the laws of the receiving state, he has correlative rights which the country of his allegiance may and does enforce. I have said that there were exceptions to the rule that only when an alien obeys the laws does he have rights. These exceptions grow out of an application of the maxim that no one can take advantage of his own wrong. If a state uses a resident alien contrary to its estab-

lished system of law, if its acts are arbitrary or cruel, or in bad faith, the fact that the alien has previously violated its law will not absolve it from blame. By entering the state and submitting himself to its laws, the alien has not forfeited his status as a national of the country of his origin. It is through this status as an alien, as a national of another state, that he has rights. He can claim, not equality of privilege, or of political, civil, or even of personal rights with the nationals of the state of his residence, but he can claim those rights which his status gives him: the fact that he has status means that he has rights. That the tie of allegiance to the country of his origin cannot be broken without the consent either of himself or of the country of his origin witnesses to the existence of rights. What these rights are international practice has not fully determined. They do not embrace all of those which Nys finds in the category of personal liberty, but they do include first and foremost a right to law and to a régime of law; second, a right to equality of treatment under that law, whether it confers equality of rights and privileges or not; and, third, as the legal system of the country regulates the social and economic relations within the state, he has a right to enter into the social and economic life of the state to the extent to which he is permitted by the law. This would have meant nothing two centuries ago. As legal systems, however, approximate uniformity, and as the tendency of legislation is toward the equality of personal and legal rights as between nationals and aliens, it means a very great deal to-day. A state can not complain if another state refuses to put aliens and nationals upon a plane of equality, but it may complain if, once this equality is conceded, its officials arbitrarily act otherwise.

An objection to this reasoning may be raised: that by it one places the resident alien upon a more favorable basis than that which the state's own nationals may have. The position of the alien is attained not because he is possessed of any more or greater rights than the national, but because through his allegiance to another state he has an additional remedy. The national can claim nothing more than his state allows through the machinery of its government. If its organization breaks down or is misused to his hurt, the national can

not look elsewhere. Not so the alien. The protection which the state owes him is no more than it owes its nationals, but if the state's government is impotent, or arbitrary, or corrupt, the alien, because he is an alien, can call upon his home state for assistance. Again we see the application of the rule that no one can take advantage of his own wrong. If the state which received nationals of other states could deny redress because of its own misdoing, modern international society would be a farce.

The state, as a member of international society, owes duties to other states which it can not avoid if it would. The duty is none the less an international one because it is owed primarily to an individual. The principle which modern international society has developed during the nineteenth century is that of equal treatment and equal protection to resident aliens and nationals. It is about the time when this idea of equality of treatment became accepted as the standard of practice among nations that one first hears of so-called "political intervention" for the purpose of protecting the "interests" of a state. Then began what has been termed the era of "peaceful penetration" and of "dollar diplomacy". Mere equality of treatment of alien and national might mean much or nothing, and it frequently resulted in gross inequality of treatment when differences in governmental standards, efficiency, and good faith were considered. In the majority of modern instances in which the question of the treatment of aliens has been raised, the national of a relatively strong state is involved as a resident of a relatively weak one. The strong state therefore emphasizes the duty of the weak state to the resident alien. The weaker state is apt to insist upon its rights as a territorially self-contained and independent entity. With the latter is undoubtedly the weight of classic authority and with it also are the precedents which the stronger states themselves have furnished when similarly situated. In 1837 the Attorney-General of the United States laid it down as a principle that "aliens coming within our territory are entitled to the same protection [as citizens] in their personal rights and no more." This was the position assumed by Seward during the Civil War. On the other hand, Secretary Bayard maintained that

it can not be admitted that in every case the rights of a foreigner in that country [Peru] may be measured by the extent of the protection to person or property which a citizen may obtain. * * * In times of civil conflict it not infrequently happens that citizens of a country are compelled to endure injuries which would afford ample basis for international intervention if they implicated a foreigner.[9]

This idea, which may be called the modern doctrine, has frequently been used since Mr. Bayard's time, not only by the United States, but by European countries as well. Against it there have been frequent protests. Certain states have attempted by treaty stipulations and by municipal laws to combat its application. Numerous conventions which the Spanish American republics have negotiated with each other and with a few European states reciprocally release claims for liability on behalf of their respective nationals on account of damage arising during insurrection and tumult. The Institute of International Law has declared such agreements as opposed to the best tendencies of international practice. A similar situation is presented by the practice of some states in inserting what is known as the "Calvo clause" in concessions made to foreigners. By this the alien agrees in case of dispute to confine himself to the national courts, and to waive all right to diplomatic redress to which as a foreigner he might be entitled. It would seem from a recent interpretation of such a clause by the Hague Permanent Court that such a waiver may be inoperative.[10] The objections to it are founded upon the fundamental one, that the alien can not be considered save as the national of another state. This status is beyond the reach of legislation by the receiving state, and can not be changed except by the acquiescence either of the country of origin or of the alien himself. So long as the bond of allegiance to the home country continues, the resident alien has rights which his home state may and will enforce.

If the facts of intercommunication and interdependence, implying new reciprocal rights and duties on the part of states, interfere with the old theories of independence and of sovereignty, so much the

[9] Moore, Int. Law Digest, sec. 912.

[10] In the Orinoco Steamship Case, Am. Journal of Int. Law, Jan. 1911, p. 50.

worse for the old theories. The closer the interdependence of the members of international society becomes, the more urgent will be the necessity for a restatement of the foundations of international law. States are not, like individuals in a state of nature, as Locke described them, where there is no one to execute the law. They exist in society and only in society is there law.

The older conflict arose between the natural rights of individuals and the primordial rights of states. The newer conflict is caused by those factors upon which the interdependence of nations is conditioned. The régime of law among states presupposes a régime of law within them. Only as an alien finds a place in the system of municipal law does he take a position in international law. His rights are neither natural nor absolute. To frame a code of law for the alien based upon natural rights would be simple. But it would not be an expression of the real facts and tendencies of either national or international life. What legal rights he has are relative. This element of relativity makes a conclusion as to the position of the alien in international law at best but tentative. One may agree with Mr. Baty that to elaborate one is the most pressing problem of international law. The basis for it, it is believed, will not be found by emphasizing the legal equality of states, but by seeing clearly that the rights of the alien depend upon his "right to law", and upon his right to be a part of the legal régime of the state in which he is a resident. Herein lies his right to engage in the social and economic activity of the state. Only as the status of aliens and nationals tend to become identical within the state, and as the legislation of various states proceeds toward harmony, will it be possible to give the rights of the alien in international law a definite and exact formulation.

The CHAIRMAN. The paper is open for discussion. [After a pause.] As there seems to be none, we will pass to the next heading, "Participation of the Alien in the Political Life of the Community," and will hear papers by Professor J. W. Garner, of the University of Illinois, and Mr. A. H. Snow, of Washington.